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No. 03-611

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID A. GOLDMEIER
and TERRY C. GOLDMEIER,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an employee have a cause of action against an employer for failure to accommodate a religious conflict under 42 U.S.C. § 2000e(j) in the absence of proof of an adverse job action?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement.

Respondent Allstate Insurance Company, an Illinois-domiciled insurance company, is a wholly-owned subsidiary of the Allstate Corporation, a Delaware corporation. The stock of the Allstate Corporation is publicly traded. No publicly-held entity holds 10% or more of the stock of the Allstate Corporation.

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STATEMENT OF THE CASE

In this case Petitioners David and Terry Goldmeier (the "Goldmeiers") seek to turn on its head the long-established legal principle that in order to recover legal relief, a plaintiff must have sustained some injury or damages. They attempt to undermine Congress's intent that employees work with their employers to resolve workplace conflicts posed by good-faith religious practices, rather than merely quitting and suing. They ask this Court to overrule the logical and well-settled jurisprudence of every circuit court of appeals which has held that an employee who seeks damages for past discrimination under Title VII of the federal Civil Rights Act of 1964 must show that his employer took a materially adverse employment action against him. Ultimately, they cite no authority supportive of their position and offer no real issue worthy of this Court's consideration.

The Goldmeiers, who are Jewish and Sabbath-observant, worked for Allstate Insurance Company ("Allstate") as insurance agents for several years. In September 1998, Allstate announced that it intended to implement in two phases the following year a new work-hours policy, under which Allstate agency offices were to be open and staffed until 6:00 p.m. on weekdays from 9:00 a.m. to 1:00 p.m. on Saturdays. Though the policy did not require that the Goldmeiers themselves staff their office during the extended hours, the Goldmeiers perceived a potential conflict with their observance of the Sabbath on Friday evenings and Saturdays.

The Goldmeiers consulted with a superior and with an Allstate human resources representative about the potential

conflict. Each advised them that their office expense budget could be used to retain assistance to staff the office during the Sabbath hours. No one at Allstate threatened the Goldmeiers with termination, docking of pay, or any other discipline for failure to keep their office staffed in accordance with the prospective policy.

After indicating in writing in late October 1998 that they intended to remain at Allstate in 1999, the Goldmeiers suddenly resigned their employment on November 16 – *fifty-three days* before Allstate *began* to implement the work-hours policy which *might* have conflicted with their religious practices.[1] Importantly, the Goldmeiers obtained other employment before their resignation. They cited this as an excuse why they could not work for Allstate even after Allstate, shortly after their resignation, contacted the Goldmeiers in December 1998 and offered to accommodate them in full by letting them come in early and leave early on Fridays and work Sundays instead of Saturdays.

The Goldmeiers filed suit against Allstate in 1999, alleging discrimination based on the proposed work-hours policy and seeking monetary damages. The district court ultimately found, and the court of appeals affirmed, that the Goldmeiers had failed to state a prima facie case of religious discrimination under Title VII because they could

[1] The weekday hours policy was to go into effect on January 1, 1999; because that day was a holiday, the first Friday on which the Goldmeiers' religious observance possibly could have been impacted was January 8, 1999. The Saturday hours policy was to go into effect on July 1, 1999; the first Saturday on which the Goldmeiers' religious observance possibly could have been impacted was July 3, 1999.

not show that Allstate had taken an adverse employment action – in the form of discharge or other discipline – against them for failure to comply with Allstate's *proposed* work-hours policy.[2] Now, seeking this Court's review, the Goldmeiers argue that the court of appeals misapplied Title VII, defied the intent of the Civil Rights Act of 1991 (the "1991 act"), and contributed to an alleged conflict among the circuit courts of appeals as to whether a plaintiff alleging Title VII religious discrimination must allege and prove, in order to recover damages, tangible discrimination in the form of an adverse employment action.

As this brief will illustrate, the Goldmeiers' contentions are erroneous, and there is no issue in this case which justifies this Court's review.

REASONS FOR DENYING THE WRIT

Review is inappropriate for two reasons. First, the court of appeals' application of Title VII comports fully with the text of and legislative purposes behind Title VII.

Second, there is in fact no conflict among the circuits. Review of the Goldmeiers' cited authority reveals the purported circuit split to be much ado about nothing. The circuits whose authority the Goldmeiers cite concur with

[2] As noted, the Goldmeiers resigned their employment, but each court concluded that the resignations did not amount to constructive discharge because a reasonable employee in the Goldmeiers' position would not have felt compelled to quit. The Goldmeiers do not challenge these conclusions.

the Sixth Circuit in requiring a Title VII religious discrimination plaintiff to demonstrate some tangible harm before permitting legal relief.

ARGUMENT

I. THE SIXTH CIRCUIT CORRECTLY APPLIED TITLE VII SO AS TO REQUIRE PETITIONERS TO DEMONSTRATE AN ADVERSE EMPLOYMENT ACTION AS AN ELEMENT OF THEIR PRIMA FACIE CASE.

The Goldmeiers first assign error by arguing that the court of appeals misread Title VII so as to require them to demonstrate some tangible harm as an element of their claim for damages. The court of appeals' application of Title VII is logically sound, and in consonance with statutory text and history as well as this Court's past precedent.

"As a matter of clear statutory language," the Goldmeiers contend, "an employer who fails to accommodate an employee's religious observation has engaged in discrimination on the basis of religion, and that employee is now entitled to maintain an action in damages." (Petitioners' Appendix at 13.) The Goldmeiers miss an important nuance. Title VII forbids discrimination against an individual with respect to "the compensation, terms, conditions, or privileges of employment, because of such individual's [religion]."[3] 42 U.S.C. § 2000e-2(a)(1). A failure

[3] Religion is defined to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he

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to accommodate violates the law only to the extent that it is discrimination – *i.e.*, to the extent that it detrimentally affects the compensation, terms, conditions or privileges of employment. If an alleged failure to accommodate does not materially affect[4] the compensation, terms, conditions or privileges of employment, it is not actionable discrimination. The Goldmeiers have not alleged, and cannot prove, *any* discrimination by Allstate because they have identified no adverse effect upon the compensation, terms, conditions or privileges of their employment. This stands to reason because there was *nothing to accommodate*; the Goldmeiers quit and took other jobs long before the policy for which they desired accommodation ever took effect.

The Goldmeiers further argue that Congress's preference for bilateral employer-employee cooperation in the resolution of conflicts between employment requirements and religious practices "is plainly frustrated if an employee is required to show, as part of a *prima facie* case, that he has suffered discipline or discharge as a result of a refusal to follow a work rule that conflicts with his religion." (Pet. App. at 11.) However, in an action for damages, an element requiring that some materially adverse employment action must have been taken against a plaintiff is necessary, because

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is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship. . . ." 42 U.S.C. § 2000e(j).

[4] *Cf. Burlington Industries v. Ellerth*, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.")

> [a]bsent this requirement, a prima facie case would lie wherever there was a sincere conflict and compensation would be due when, in addition, the employer does not immediately adopt a reasonable accommodation. What a successful religious discrimination claim would not require would be any actual employer action to the detriment of the employee. Employers who, while not offering a formal accommodation, deliberately turned a blind eye to employees' religiously motivated minor deviations from the letter of company policy – not an unusual situation one would imagine – would suddenly find themselves liable as civil rights offenders.

Goldmeier v. Allstate Ins. Co., 337 F.3d 629, 637-38 (6th Cir. 2003) (*reprinted at* Pet. App. at 13a-14a). Put differently, if an employer sets a policy which, if enforced, would violate a certain employee's Title VII rights, but then *does not enforce* the policy against that employee, the employer essentially *has accommodated* that employee. Likewise, if an employer has *proposed* but *not implemented* a policy which in application might pose a conflict and possibly require accommodation, there can be no failure to accommodate because, until the policy is implemented, there is nothing to accommodate. Either way, if there is no detriment to the employee, there is no discrimination, and thus no ground for damages.

Unsurprisingly, the Goldmeiers cite no case law which supports their argument that, by making available compensatory damages, the 1991 act operated to somehow eviscerate the requirement that a plaintiff former employee actually have suffered some materially detrimental job action in order to recover damages. Plaintiffs cite the 1991 act's legislative history for the general principle that

compensatory damages were made available "to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity." (Pet. App. at 12, citing H.R. No. 102-40(I) at 64-65, *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03.) However, if there is any doubt that Congress did not intend to subject employers to compensatory damages in the absence of harm, this legislative history settles it: "The bill would allow compensatory damages to be awarded only if a plaintiff proves *actual injury or loss* resulting from intentional discrimination." H.R. No. 102-40(I), at 74, *reprinted in* 1991 U.S.C.C.A.N. 549, 612.

Thus, neither the plain text of the relevant portions of Title VII, nor the legislative history behind their enactment, supports the Goldmeiers' spurious argument. Nor does this Court's prior precedent. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) ("the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case – *i.e.*, the burden of producing evidence that the *adverse employment actions* were taken for a legitimate, nondiscriminatory reason.") (internal quotation marks, citation omitted); *Ellerth, supra*, 524 U.S. at 761 ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

The Goldmeiers were not victims of discrimination. There was no "failure to accommodate" because the Goldmeiers resigned and took other jobs long before there was any conflict for Allstate to accommodate. Incredibly, the

Goldmeiers pursue monetary damages – a remedy for *past* discrimination – because they speculate that, at some point in the *future*, they would have been discriminated against, presumably by termination or some other penalty. It is clear from Title VII's text and history that such conjecture cannot be the basis of a claim for damages.

II. THE CIRCUIT COURTS OF APPEALS AGREE THAT AN ADVERSE EMPLOYMENT ACTION IS A REQUISITE ELEMENT OF A TITLE VII RELIGIOUS DISCRIMINATION CLAIM FOR DAMAGES.

The Goldmeiers attempt to construct a circuit split where there is none. Allstate can locate no authority which states that a plaintiff seeking damages for failure to accommodate need not demonstrate harm in the form of some adverse job action.

To illustrate discord among the circuit courts, the Goldmeiers rely primarily on *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476 (2d Cir. 1985), arguing that the Second Circuit Court of Appeals has "expressly rejected the 'discipline or discharge' element" of the prima facie case. (Pet. App. at 7, n.1., citing *Philbrook*, 757 F.2d at 482-83.) This is simply incorrect, as the plain text of *Philbrook* demonstrates:

> We first adopt the approach to plaintiff's prima facie case taken by several courts of appeal: A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) *he*

> *or she was disciplined* for failure to comply with the conflicting employment requirement.

Id. at 481 (citing *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)). This was and is the law in the Second Circuit.[5]

The flaw in the Goldmeiers' reading of *Philbrook* is apparent on the face of their petition. To support their argument that the Second Circuit has rejected the "discharge or discipline" element of the prima facie case, they quote *Philbrook* selectively: "While we acknowledge that some courts have stated that *discharge* was required to make a prima facie showing of discrimination, Title VII prohibits not only discrimination in hiring and firing but also discrimination with respect to compensation, terms, conditions or privileges." (Pet. App. at 7, quoting *Philbrook*, 757 F.2d at 483 (internal quotation marks omitted, emphasis added)). When this excerpt is read in conjunction with *Philbrook's* explicit adoption of a "discipline" element, it is clear that the Second Circuit – like the other circuits, including the Sixth – requires an element of "discipline *or* discharge." The holding of *Philbrook* is that a plaintiff need not have been *discharged*, but rather may state a claim if he was *disciplined*.[6] To say that the Second

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[5] *See, e.g., Knight v. Connecticut Dep't of Public Health*, 275 F.3d 156, 167 (2d Cir. 2001) ("To make out a prima facie case of religious discrimination, Knight and Quental must show (1) they held a bona fide religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; and (3) *they were disciplined* for failure to comply with the conflicting employment requirement.") (citing *Philbrook*) (emphasis added).

[6] Petitioner Philbrook, in fact, had been disciplined by having his pay docked on days he missed work to observe religious holidays. *See*

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Circuit does not require a showing of some element of harm is simply to misread *Philbrook* and its progeny.

Nor does *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), support the Goldmeiers' argument. Rather than "assum[ing], without expressly deciding, that a 'discipline or discharge' requirement is not a component of a failure to accommodate claim," as the Goldmeiers assert, in fact the court did not address that issue simply because it was not one preserved for and presented on appeal.[7] In fact, the Seventh Circuit, before and after *Rodriguez*, has required the adverse employment action element. *See, e.g., Equal Employment Opportunity Comm'n v. United Parcel Service*, 94 F.3d 314, 317 (7th Cir. 1996) ("An individual alleging religious discrimination must ordinarily show that: (1) a bona fide religious practice conflicts with an employment requirement, (2) he or she brought the practice to the employer's attention, and (3) *the religious practice was the basis for [an] adverse employment decision.*") (citing *Wright v. Runyon*, 2 F.3d 214, 216 n.4 (7th Cir. 1993)) (emphasis added); *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 478 n.2 (7th Cir. 2001) (same holding, citing *United Parcel Service*).

Finally, the Goldmeiers assert that in *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), the

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Philbrook, 759 F.2d at 479. Accordingly, the court held, "it seems clear that *appellant suffered a detriment* from the conflict between his religious practices and the employment requirements." *See id.* at 482 (emphasis added).

[7] The City did not contend, in its motion for summary judgment before the district court, that Rodriguez had failed to establish a prima facie case. *See Rodriguez v. City of Chicago*, 975 F. Supp. 1055, 1058-59 (N.D. Ill. 1997).

Ninth Circuit Court of Appeals refrained from "impos[ing] a discipline or discharge requirement in a case seeking to enjoin the failure to accommodate." (Pet. App. at 14.) In fact, the court affirmed the district court's order which enjoined the defendant employer and labor union from *discharging* the plaintiffs for failure to pay union dues. Had the Goldmeiers remained at Allstate, had Allstate implemented the work-hours policy, had the policy impacted the Goldmeiers' religious practices, had Allstate refused to accommodate those practices, and had the Goldmeiers actually been immediately threatened with discharge or discipline, the Goldmeiers might have had grounds to sue for an injunction to compel Allstate to accommodate them; but those are not the circumstances in this case.

In any event, the Ninth Circuit repeatedly has stated the elements of a prima facie case, and they are the same as those required in other circuits. *See, e.g., Tiano v. Dillard Dep't Stores*, 139 F.3d 679, 681 (9th Cir. 1998) ("This court has established a two-part framework to analyze Title VII religious discrimination claims. First, the employee must establish a prima facie case by proving that (1) she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) she informed her employer of the belief and conflict; and (3) the employer threatened her or subjected her to *discriminatory treatment, including discharge,* because of her inability to fulfill the job requirements.") (internal citation omitted) (emphasis added); *Lawson v. Washington*, 296 F.3d 799, 804 (9th Cir. 2002) (same holding). In an action for damages, mere failure to invent an accommodation is insignificant in the absence of some discriminatory treatment.

The Second, Seventh and Ninth Circuits are fully in accord with the Sixth Circuit on this point: to provide

grounds for compensatory damages, discrimination must be manifested in some tangible adverse action. This is the rule consistently applied throughout the circuits and properly applied here.

CONCLUSION

Rather than cooperate with Allstate to resolve the anticipated conflict, the Goldmeiers – after conveniently lining up new jobs – suddenly quit, with no notice to Allstate, fifty-three days before the new work-hours policy was scheduled to go partially into effect and nearly eight months before it was to become fully effective. Now the Goldmeiers, with no proof of any adverse employment action ever taken against them by Allstate, incredibly contend that they may recover damages from Allstate based on their speculation that a work-hours policy which never went into effect while the Goldmeiers worked for Allstate ultimately might have impacted their religious practices.

No real issue of statutory interpretation or circuit court divergence exists. Accordingly, this Honorable Court should deny the Goldmeiers' petition for writ of certiorari.

Respectfully submitted,

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